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U.S. Department of Labor

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In the Matter of

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT  
Complainant

v.

UNITED STATES DEPARTMENT OF LABOR  
Respondent

and

CALIFORNIA HUMAN DEVELOPMENT  
CORPORATION  
Intervenor  
.....

Case No. 84-JTP-4

Mary Ellen Combo, Esquire  
For the Complainant

E. Kathleen Shahan, Esquire  
For the Respondent

Noel H. Klores, Esquire  
For the Intervenor

Before: NICODEMO DEGREGORIO  
Administrative Law Judge

Decision and Order

This proceeding arises under the Job Training Partnership Act (JTPA), 29 U.S.C. §1501 et seq., and implementing regulations, 20 C.F.R. Parts 633, ~~636~~ (48 FR 48744; October 20, 1983).

Statement of the Case

In July 1983 State of Washington Employment Security Department (Complainant) filed application for a grant under §402 of JTPA to provide job training, employment opportunities and other services for migrant and seasonal farmworkers in the State of Washington for fiscal year 1984. By letter dated

September 20, 1983 Complainant was advised that the Grant Officer had denied the application. A petition for reconsideration was denied on October 13, 1983. Complainant then requested a hearing. California Human Development Corporation (Intervenor), the grant recipient for the State of Washington, was permitted to intervene in the case. The case was heard in Washington, D.C. on July 19, 1984.

Findings of Fact and Conclusions of Law

I

Section 402(c)(1) of JTPA directs the Secretary of Labor to provide training and employment services to migrant and seasonal farmworkers, through such public agencies and private nonprofit organizations as he determines to have "an understanding of the problems of migrant and seasonal farmworkers, a familiarity with the area to be served, and a previously demonstrated capability to administer effectively a diversified employability development program" for such workers. 29 U.S.C. §1672(c)(1). In awarding grants or contracts under this provision, the Secretary must use procedures consistent with standard competitive Government procurement policies.

In order to implement these provisions, the Secretary published in the Federal Register of May 27, 1983 a Solicitation for Grant Application (SGA). 48 FR 23932, The SGA set out procedures to be followed by applicants for grants, and by the Department of Labor in rating the applications. An application had to meet specified precondition-for-grant requirements, and then pass a competitive review and a responsibility review. The SGA also announced a rating system allocating a range of points to each of four standards of evaluation: (1) Administrative Capability (0 to 40 points); (2) Program Experience (0 to 30 points); (3) Program Approach and Delivery System (0 to 20 points); and (4) Linkages and Coordination (0 to 10 points). Finally, the SGA provided that any applicant denied a grant would be advised of its appeal rights.

Edward A. Tomchick, Director of the Office of Acquisition Assistance, had ultimate responsibility for processing grant applications and making awards under section 402 of JTPA. The summer of 1983 was a hectic period for Mr. Tomchick. His office received about 300 grant applications under the migrant farmworkers program and the native American program. And processing these applications was only part of his responsibility, since, in addition to being a Grant Officer for these programs, Mr. Tomchick was also a contracting officer for the Employment and Training Administration.

Mr. **Tomchick** set up two review panels to evaluate grant applications regarding farmworkers, one panel for the eastern part of the country and the other for the western part. Certain precautions were taken in order to obtain an objective and impartial evaluation process. Because complaints had been voiced in the past, that the selection process tended to favor current grantees over new entrants in programs, only one of three panel members was selected from the program office responsible for administering grants; the other two were drawn from other offices of the Department of Labor. (Tr. 90-91). Also, the identity of the panelists was disclosed only to a few persons, in order to shield the panelists from improper influences (Tr. 203).

The review panels were instructed concerning their duties in a training session (Tr. 202-203), and in writing, R. Ex. 5, Tab E. Briefly, the panel members were to read and evaluate all proposals; each panelist was given a rating form for each criterion, with scoring instructions and space for a description of specific strengths and weaknesses of each proposal. See, e.g., Cl. Ex. 2. Chapter III, paragraph B of the Review Panel Instructions stressed the importance of each panelist including such a description for each criterion: "**The** descriptions will provide information to the Grant Officer to understand the reasons a proposal is considered technically strong or weak, and allow the Grant Officer to make decisions as to which grant to fund... The descriptions of strengths and weaknesses will be used to debrief those proposers who are not selected for award. If, necessary, this information will be used to support the Government's case in appeal decisions." R. Ex. 5, Tab E. In other words, space was provided on the rating forms for a written justification of the score awarded. R. Ex. 5, Tab E, Ch. III, C.

Three grant applications were filed for the State of Washington. After one applicant was found to be non-responsible, the competition was between Complainant and Intervenor. Complainant's application received an overall panel score of 57; **Intervenor's**, 69. R. Ex. 5, Tab C. Intervenor was selected for the grant, and Complainant requested a hearing.

## II

It is Complainant's contention that the Grant Officer's selection of Intervenor was arbitrary and capricious in four respects. First and foremost, it argues that the Grant Officer either ignored, or gave insufficient consideration to, the

statutory requirement of familiarity with the area to be served, since, in Complainant's view, **Intervenor's** entire program was run out of the State of California, and its application shows little familiarity with the State of Washington. The second and third objections go to the competence and impartiality of the panel. It is argued that the proposals were evaluated by panelists who had no particular knowledge of programs for migrant and seasonal farmworkers, and who revealed bias in comments made. Finally, a general argument is made that the panelists made prejudicial comments, e.g. about insensitivity to farmworkers' problems, and found apparently serious inadequacies, without stating either their factual basis in the applications or the weight given to them.

In support of the Grant Officer's decision, Respondent starts off by emphasizing a narrow scope of review, whether there is a basis in the record to support the decision. Respondent asserts this to be similar to the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. §706(2)(A). Respondent argues that the evaluation process was competent and fair, that there is no showing of bias, and ~~that~~ <sup>in</sup> sum, Complainant has failed to demonstrate that the decision lacks a rational basis. Finally, ~~it~~ is Respondent's position that, should I disagree with the Grant Officer, I may not designate the State of Washington as grantee. The only remedy would be to remand for reconsideration.

Intervenor also argues, in support of the decision, that the Grant Officer has properly considered the statutory requirements, that there is no showing of bias, and that the panel recognized the strengths and weaknesses of the competing proposals and took them into account in rating the applications.

I have concluded that a review of the Grant Officer's decision is not possible, in that he has not articulated a satisfactory explanation for its action. Thus, the case must be remanded for reconsideration of both Complainant's and **Intervenor's** proposals and for the issuance of a reasoned determination.

III

20 C.F.R. 633.205(e) provides that an applicant whose application is denied may request administrative review as provided in Part 636, "with respect to whether there is a basis in the record to support the Department's decision". 48 F.R. 48774 (October 20, 1983). <sup>1/</sup> I accept Respondent's contention that this standard is akin to the "arbitrary and capricious" standard of the APA. See Northwest Rural Opportunities, Inc., 84 JTP 3, at 7 (January 26, 1984). I note that Complainant's arguments assume the same standard.

The scope of review under this standard is narrow, and a reviewing body may not substitute its judgment for that of the agency; however, the agency must examine the relevant facts and articulate a satisfactory explanation for its action. Bowman Trasp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-286, 95 S. Ct. 438, 442 (1974); Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 103 S. Ct. 2859, 2866-2867 (1983). It is that explanation which is the subject of review, in order to determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Ibid. And while review of a decision must be based on the full administrative record, the record without an explanation may not be enough, since a bare record may support any one of several choices. See Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S. Ct. 814, 825 (1971). In sum, the purpose of review is to ensure reasoned decisionmaking. Therefore, agency action may be upheld, if all, only on the basis articulated by the agency itself. Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 103 S. Ct. 2859, 2870 (1983).

In the case at bar, no adequate explanation of the Grant Officer's decision was ever given. Clearly, no reasons were given in the notification of non-selection, dated September 20, 1983, nor in the denial of reconsideration, dated October 13, 1983. R. Ex. 5, Tab A. For this reason, Complainant found it difficult to state in its request for hearing "those provisions of the determination upon which a hearing is requested." Ibid.

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<sup>1/</sup> Although this regulation was not in effect at the time of the decision, September 20, 1983, the opportunity for an appeal promised by the SGA implied the requirement for a statement of findings and reasons. See Yong v. Regional Manpower Administrator, 509 F.2d 243, 246 (9th Cir. 1975).

Nor was an adequate explanation afforded at the hearing. The Grant Officer was called to the stand. He testified that the selection of the grantee for the State of Washington was made at a meeting, which was apparently attended by personnel from the program office, and that he had the panel scores in front of him (Tr. 98, 213). The Grant Officer testified that he had never seen the grant proposals, and could not recall ever seeing the comments of the individual panelists, the summaries of the panel chairpersons, or the brief and vague statements of the relative strengths and weaknesses of Complainant's and Intervenor's proposals. (Tr. 98, 99, 101, 102, 111, 113, 118). He further testified that he relied on a staff member, Ms. Patricia Wilkinson, to supervise the review process and report to him, but could not recall discussing the merits of the two proposals with her or other members of his staff. (Tr. 98, 124, 138, 145-146). Finally, when questioned by Complainant about Intervenor's proposal with regard to familiarity with the area to be served, linkages, and organizational set-up, the Grant Officer testified that it was enough for him that the panel had considered those points. (Tr. 82, 84, 128-130).

The testimony of the Grant Officer suggests two possibilities. Either he considered only the numerical scores given by the panel to the two proposals and simply selected the one with the higher score, or he was unable to remember the factors considered, and the reasons for, the decision. In either case, there is no adequate explanation. Even if the Grant Officer had simply adopted the conclusions of the review panel, this confusing variety of conclusory comments does not answer the ultimate question: having due regard to the policies and objectives of section 402 of JTPA, why was one proposal, despite its deficiencies, better than the other, not withstanding the merits of the latter? No such analysis appears to have been attempted. The review process, on which so much reliance has been placed, does not answer the question, if only because it was not designed to do so. The written instructions contemplated that the Grant Officer would do this kind of reasoning, after receiving the comments of the review panel.

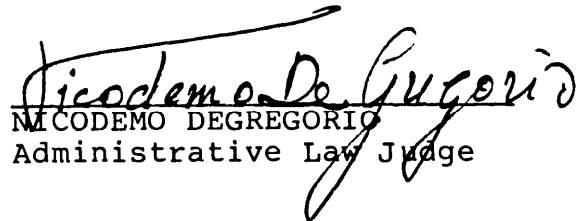
I may observe that one of the panelists may have misconceived his/her role. The panelist gave Intervenor's proposal a total score of 80, which is significantly higher than the other scores of 70 and 56. Yet, instead of describing both the good and bad points of the proposal, the panelist noted only inadequacies, with the paradoxical result that the highest score appears to be based on a list of deficiencies. Cl. Ex. 2.

IV

By reason of the foregoing, I conclude that the record of this case, because of the absence of a rationale for the Grant Officer's decision, does not permit a determination of whether the decision was arbitrary and capricious, or whether there is a basis for it in the record. The case is remanded to the Grant Officer for reconsideration of Complainant's and **Intervenor's** grant applications, and for an adequate explanation of any decision that may be made.

ORDER

This case is remanded to the Grant Officer for further proceedings consistent with this opinion.

  
NICODEMO DEGREGORIO  
Administrative Law Judge

**SEP 27 1984**

Dated:  
Washington, D.C.

NND:pas

SERVICE SHEET

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U.S. DEPT. OF LABOR and CALIFORNIA HUMAN DEVELOPMENT CORP.

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Document Issued: DECISION AND ORDER

SEP 27 1984

I, Paula A. Shipp, certify that on \_\_\_\_\_ the above  
named document was mailed to the last known addresses of each  
of the following parties and their representatives:

  
PAULA A. SHIPP  
Legal Technician

REGULAR MAIL

Ernest F. La Palm  
Deputy Commissioner  
State of Washington  
Employment Security Dept.  
1007 S. Washington, MS EL-01  
Olympia, WA 98504

Noel H. Klores, Esq.  
Boasberg, Klores, **F**eldesman  
& Tucker  
2101 L St., N.W., Suite 906  
Washington, D.C. 20037

Mary Ellen Combo  
Asst. Attorney General  
Office of the Attorney General  
Temple of Justice  
Olympia, WA 98504

Edward Tomchick, Director  
Office of Contracting  
U.S. Dept. of Labor/ETA  
601 D St., N.W.  
Washington, D.C. 20213

Joseph T. Paslawski  
Deputy to the Special Counsel  
U.S. Dept. of Labor/ETA  
601 D St., N.W., Rm. 7120  
Washington, D.C. 20213

David O. Williams  
Office of the Special Counsel  
U.S. Dept. of Labor/ETA  
601 D St., N.W., Rm. 5100  
Washington, D.C. 20213

James B. Leonard  
Assoc. Regional Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Rm. 1226  
Arlington, VA 22203

William R. **DuRoss**, III, Esq.  
Assoc. Solicitor for ETA  
U.S. Dept. of Labor  
200 Const., Ave., N.W. Rm. N2101  
Washington, D.C. 20210  
Attn: E. Kathleen **Shahan**, Esq.

Douglas Cochennour, Director  
Division of Financial Policy  
Audit & Closeout  
U.S. Department of Labor  
601 D St., N.W.  
Washington, D.C. 20213